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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK MARSH, STATE TREASURER, ET AL.,
Petitioners,

v.

ERNEST CHAMBERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR JON GARTH MURRAY, MADALYN MURRAY O'HAIR, AND THE SOCIETY OF SEPARATIONISTS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE *

Jon Garth Murray and Madalyn Murray O'Hair are two individual atheists and federal taxpayers. They are also officers of the Society of Separationists, a non-profit organization of atheists most of whose members are federal taxpayers. One of the purposes of the organization is to safeguard the civil liberties of atheists. Mr. Murray, Ms. O'Hair, and the Society of Separationists, either separately or together, have in fact been parties to, or have participated as amici in, a number of lawsuits which have

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* This brief is filed with the written consent of the parties, pursuant to Supreme Court Rule 36.

raised questions concerning the proper interpretation of the First Amendment to the United States Constitution.

More specifically, in June of 1980 the amici filed a complaint in federal district court challenging the constitutionality of using taxpayer funds to compensate the chaplains of the United States House and Senate. That lawsuit is now pending before the United States Court of Appeals for the District of Columbia Circuit, awaiting a determination by that court of whether the amici have standing and whether the lawsuit presents a nonjusticiable political question. *Murray v. Buchanan*, No. 81-1301 (reheard en banc October 27, 1982). Because the Nebraska Legislature also uses taxpayer funds to compensate its chaplain, the Court's decision in the instant case may provide substantial insight into the constitutionality of compensating the chaplains of the House and the Senate out of public funds.

SUMMARY OF ARGUMENT

A publicly-funded legislative chaplaincy is, as James Madison recognized, a palpable violation of the Establishment Clause of the First Amendment. One of the specific practices the Establishment Clause was designed to prevent was "[t]he imposition of taxes to pay ministers' salaries." *Everson v. Board of Education*, 330 U.S. 1, 11 (1947).

That the First Congress had publicly-funded legislative chaplains is not dispositive of the constitutionality of the practice. In *Brown v. Board of Education*, 347 U.S. 483 (1947), this Court specifically rejected the argument that a practice cannot be said to violate a constitutional amendment if the Congress that proposed the amendment, and most of the states that ratified it, permitted or required the practice. Just as the changing emphasis on public education led this Court in *Brown* to conclude that the historical evidence it was presented with was at best

"inconclusive", *id.* at 489, so too the "profound changes" in our country's "religious composition" that have taken place since the time of the First Congress, *see Abington School District v. Schempp*, 374 U.S. 203, 240-41 (1963) (Brennan, J. concurring), indicate that a publicly-funded legislative chaplaincy is today, because of our nation's religious diversity, inconsistent with the very values the First Congress enshrined in the First Amendment. "[P]ractices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the non-believers alike." *Id.*

A publicly-funded legislative chaplaincy fails to meet any of the criteria it needs to satisfy to pass muster under the Establishment Clause. *See Larkin v. Grendel's Den, Inc.*, 51 U.S.L.W. 4025, 4027 (1982); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). No extended analysis is required to establish this point. It is sufficient to look at the practice in the United States Congress. There on a routine basis the chaplains utilize their tax-supported pulpits to lecture our nation's legislators on the immorality of those whose religious viewpoints differ from theirs. *See, e.g.*, 128 Cong. Rec. S4115 (daily ed. April 28, 1982) (criticism of those who believe in evolution). To hold that the tax dollars of religious dissenters can be used to fund prayers in our nation's legislatures which deride the beliefs of those dissenters would make a mockery of the First Amendment.

ARGUMENT

THE NEBRASKA LEGISLATURE'S USE OF TAXPAYER FUNDS TO COMPENSATE ITS CHAPLAIN IS A FLAGRANT VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

Nebraska uses taxpayer dollars to pay a chaplain to open each session of its legislature with prayer.[1] No lengthy analysis of cases interpreting the Establishment Clause of the First Amendment should be needed to arrive at the conclusion that this practice constitutes a flagrant violation of the Establishment Clause. It should be sufficient to remind ourselves that "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Flast v. Cohen*, 392 U.S. 83, 103 (1968). As this Court pointed out in *Everson v. Board of Education*, 330 U.S. 1, 12 (1947), one of the principal reasons the Establishment Clause was adopted

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[1] The amici believe that the judgment of the court of appeals that Nebraska's present chaplaincy program is unconstitutional should be affirmed, but not simply because of the lengthy tenure of Nebraska's present chaplain, which was a factor the court of appeals deemed especially significant. *Chambers v. Marsh*, 675 F.2d 228, 234 (1982). Without discounting the importance of the tenure of Reverend Palmer as underscoring the improper alliance between Church and State that Nebraska's chaplaincy represents, the crucial factor that makes the Nebraska practice unconstitutional is the use of tax dollars to fund the practice. Amici submit that a program that rotated the office of legislative chaplain among a number of individuals from different faiths would still be unconstitutional if tax dollars were used to fund the program. On the other hand, if a legislature enjoyed the services of a volunteer chaplain or if the members of the legislature supported the chaplain out of their own pockets, such a legislative chaplaincy might well be constitutional. In the latter case there would be no compulsion by the government to provide financial support for religious practices and opinions.

was to ensure "that no person, either believer or nonbeliever, [would] be taxed to support a religious institution of any kind." A legislative chaplaincy is unmistakably a "religious institution", and, therefore, cannot constitutionally be supported by tax dollars.[2] One of the specific practices the Establishment Clause was designed to prevent was "[t]he imposition of taxes to pay ministers' salaries." *Id.* at 11.

Nonetheless, Petitioners and amicus curiae United States urge this Court to sustain the constitutionality of Nebraska's practice. Relying on a myopic and ahistorical interpretation of the Establishment Clause, they argue that because the First Congress had chaplains who were compensated from public funds, this is somehow dispositive of the merits of Respondent's claim. Petitioners' Brief at 24-25; Brief for the United States at 5-18. Secondly, they argue that the challenged practice is in any event constitutionally sound because it has an allegedly secular purpose and effect and does not involve an excessive entanglement between Church and State. Petitioners' Brief at 27-34; Brief for the United States at 19-32. Neither of these contentions is well-taken.

A. A Proper Understanding of the Early History of Our Country Conclusively Demonstrates That the Establishment Clause Should Not Be Given the Excessively Narrow Interpretation Urged by Petitioners

Petitioners adopt by reference the extensive analysis offered by amicus curiae United States of the early his-

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[2] Although this Court has not passed on this issue, it is possible that the use of tax dollars to support chaplaincies in the armed services or in prisons might be constitutionally proper in light of the competing free exercise rights of individuals who, under government auspices, have been removed to locations where they do not have ready access to religious services. *See, e.g., Theriault v. Silber*, 547 F.2d 1279 (5th Cir. 1977) (upholding tax-supported prison chaplaincies). Petitioners have not even attempted to argue that the free exercise rights of Nebraska's legislators would be threatened were there no legislative chaplain in Nebraska.

tory of this country as it relates to legislative chaplains. Petitioners' Brief at 24-25; Brief for the United States at 5-18. Some of this analysis is factually mistaken,[3] and much of it is irrelevant,[4] but, in any event, this analysis is used in support of an argument that is constitutionally unsound. Distilled to its essential core, Petitioners' contention is that because the Congress that proposed the First Amendment had legislative chaplains who were compensated out of public funds, this somehow is dispositive of the merits of Respondent's claim. Petitioners' argument can be cast as follows: if Congress authorizes a practice contemporaneously with its approval of a specific constitutional amendment, that practice cannot subsequently be said to violate that amendment.

This argument has been unequivocally rejected by this Court. In *Brown v. Board of Education*, 347 U.S. 483

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[3] The United States misrepresents Madison's views on the public funding of Congressional chaplaincies. *See infra*, pp. 13-16.

[4] The First Amendment was not ratified until 1791. It was not applicable to the states until the passage of the Fourteenth Amendment, and the religion clauses of the First Amendment were not actually applied in cases involving challenges to a state's action until this century. *See Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Thus, discussion of the practices of the Continental Congress or of early colonial or state legislatures is not especially relevant to a determination of the precise meaning of the Establishment Clause. Almost every colony exacted some sort of tax for support of churches. *Everson*, 330 U.S. at 10 n.8 and authorities cited therein. Even after the ratification of the First Amendment, some states used tax dollars in a way that unquestionably would have violated the Establishment Clause had it been applicable to their action. Thus, for example, Massachusetts, Vermont and New Hampshire (three of the four states cited in the Brief for United States, pp. 8-9, as having had legislative chaplains) all had established churches and used tax dollars to support these churches. *See* C. Antieau, *Freedom from Federal Establishment* 168-70 (1964) and authorities cited therein; *see also Colo v. Treasurer & Receiver General*, 378 Mass. 550, 392 N.E.2d 1195, 1198-99, n.10 (1979).

(1954), this Court considered the question of whether segregated public schools violated the Fourteenth Amendment. The appellees in that case argued that because the Congress that proposed the Fourteenth Amendment,[5] and most of the states that ratified it, either permitted or required segregated schools, the Fourteenth Amendment could not be read to prohibit segregated schools. *See* Brief of Appellee Board of Education of Topeka, Shawnee County, Kansas at 28-29, *reprinted in* 49 *Landmark Briefs and Arguments of the Supreme Court of the United States* 95-96 (P. Kurland & G. Casper ed. 1975); *see also* Appendix to the Supplemental Brief for the United States on Reargument at 160 *et seq*, reprinted in 49A *Landmark Briefs* 165 *et seq.* (extensive survey of historical materials shows that over half of the ratifying states permitted or required segregated schools contemporaneously with approval of Fourteenth Amendment). The Supreme Court found this argument "inconclusive" principally because the changing role of public education cast doubt on whether those who proposed, adopted and ratified the Fourteenth Amendment would today approve of segregated schools. *Id.* at 489.

The mistake Petitioners make is that by engaging in "[a] too literal quest for the advice of the Founding Fathers", *see Abington School District v. Schempp*, 374 U.S. 203, 237 (Brennan, J. concurring), they ignore the enduring values underlying the First Amendment. Under their peculiar brand of constitutional jurisprudence, to interpret a constitutional amendment one simply looks at the actions that were approved or tolerated by those responsible for the amendment, while ignoring the historical setting for these actions. This Court has rejected such a shallow understanding of the Constitution. *Brown*, 347

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[5] In 1862, 1864, 1866 and 1874, Congress, under its legislative authority for the District of Columbia, enacted legislation which specifically provided for segregated public schools in the District of Columbia. *See Carr v. Corning*, 182 F.2d 14, 17 (D.C.Cir. 1950).

U.S. at 489. The proper inquiry is not "What did the Framers do?", but "What would the Framers do today?" This Court must ask itself whether "the practices here challenged threaten those consequences which the Framers deeply feared." *Abington School District*, 374 U.S. at 236 (Brennan, J. concurring). The fact that the First Congress had publicly-funded chaplains does not mean that the Founding Fathers would today, in light of the "profound changes" in our country's "religious composition", *id.* at 240-41 (Brennan, J. concurring), countenance such a practice. To be precise, the Framers may have thought that the payment of the salaries of Congressional chaplains out of public funds would be unobjectionable as long as the chaplains fairly represented what limited religious diversity was prevalent at that time, *i.e.*, as long as the chaplains were not chosen exclusively from one Protestant denomination. Thus, the early congresses tried to avoid any appearance of favoring one (Protestant) denomination over another by explicitly providing, through concurrent resolutions, that the chaplains were to be of different denominations. *See, e.g.*, 1 Journal of the Senate 12 (1789). Whether the Framers would have approved of Congressional chaplains had they lived in a nation with as heterogeneous a religious composition as ours today, including a substantial, albeit relatively small, number of atheists and agnostics, is extremely doubtful. As Justice Brennan has stated, our forefathers:

> knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all . . . .
>
> In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive

> to many persons, the deeply devout and the nonbelievers alike.

Abington School District, 374 U.S. at 240-41 (concurring opinion) (citations and footnotes omitted).

It is especially significant with respect to the issue before this Court that atheists and agnostics, individuals likely to take offense at any government-sponsored prayer no matter how "nondenominational", were either very few in number at the time of the First Congress or, in view of the daunting legal and social burdens placed upon acknowledged atheists and agnostics, were unwilling to profess their beliefs openly.[6] There are no statistics concerning the number of atheists or agnostics in early America, but indirect evidence of their scarcity is provided by noted histories of the religious sentiments of that period which make no mention of atheism or agnosticism. *E.g.*, W. Sweet, *Religion in Colonial America* (1947). Although a substantial number of early Americans were unchurched, this was due to their "indifference", *i.e.*, their lack of predilection for any one particular (Protestant) denomination, rather than an indication of widespread ag-

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[6] Some of these legal burdens are outlined in Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 Yale L.J. 659 (1930).

Amici hasten to point out that it is not their position that only atheists would object to publicly-funded legislative prayer. Theists of many different faiths have, throughout our history, objected to government-sponsored prayer; *see infra* pp. 13-16. One of their reasons for doing so is that government-sponsored prayer is inevitably degrading to religious beliefs, *see Engel v. Vitale*, 370 U.S. 421, 431 (1962), since such prayer will come to be considered by many as a mere ceremonial adjunct to government functions. *See* Petitioners' Brief at 30 (Nebraska's legislative prayers "nothing more" than a ceremonial action). Nonetheless, the absence or scarcity of atheists and agnostics at the time of the founding of this Republic may have led some of the Founding Fathers to think that a legislative chaplaincy could be successful in accommodating everyone's religious beliefs, and, therefore, at least not be objectionable on those grounds.

nosticism or atheism. *Id.* at 336-38. Benjamin Franklin, although by no means an orthodox Christian, is reported to have said that "Atheism [in America] is unknown; infidelity rare and secret, so that persons may live to a great age in this country without having their piety shocked by meeting either an atheist or an infidel." J. Robertson, *A Short History of Free Thought* 379 (1957). Furthermore, atheists, due in part to their scarcity, were regarded as immoral or untrustworthy, even by some educated members of society, and therefore their concerns were not thought worthy of consideration by some of the Founding Fathers. In this regard it is noteworthy that Oliver Ellsworth, a member of the Constitutional Convention, later Chief Justice of the United States, and, more importantly, a Senator in the First Congress and a member of the Senate committee responsible for selecting the first Congressional chaplains, held the following view regarding the moral character of atheists and atheism:

> But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. *It has a right to prohibit and punish gross immoralities and impieties;* because the open practice of these is of evil example and detriment. *For this reason, I heartily approve of our laws against* drunkenness, profane swearing, blasphemy, and *professed atheism.*

Connecticut Courant, Dec. 17, 1787 *as quoted in* A. Stokes, *Church and State in the United States* 535 (1950) (emphasis added).

Because of the lack of religious diversity in this country at the time of the First Congress, some of the Framers understandably believed that their concern for eliminating religious strife would not necessarily be disserved as long as the government remained neutral among the sects (almost exclusively Protestant) then prevalent in the country. Some of the Framers, therefore, had no quarrel with a publicly-funded Congressional chaplaincy that

fairly represented what little diversity there was in religious viewpoints. It is noteworthy in this regard that at the Continental Congress this concern with accommodating Protestant sects was quite explicit. At that Congress there was some concern among the delegates that an opening prayer would divide them, since some were Episcopalians, some Quakers, some Anabaptists, some Presbyterians and some Congregrationalists, but Samuel Adams apparently persuaded the delegates that such a prayer need not be offensive to the members of these different (Protestant) sects. *See* Brief for the United States at 9 n.5. No mention was made of the need to accommodate Catholics, Jews, Moslems, Buddhists, agnostics or atheists.

The Framers' understandable emphasis on eliminating rivalries among Protestant sects might lead one to adopt the mistaken view that the Establishment Clause was *only* designed to eliminate rivalries among Protestant sects. This is the view implicitly adopted by Petitioners; it is also the view explicitly adopted by the nineteenth century reports of the House and Senate Judiciary Committees which upheld the constitutionality of Congressional chaplaincies. *See* Brief for the United States at 13-14. Thus, the 1854 report of the House Judiciary Committee states:

> At the time of the adoption of the constitution and the amendments, the universal sentiment was that Christianity should be encouraged—not any one sect. Any attempt to level and discard all religion, would have been viewed with universal indigation. The object was not to substitute Judaism or Mahomedanism, or infidelity, but to prevent rivalry among sects to the exclusion of others.

H. Rep. 124, 33d Cong., 1st Sess., at 6.[7] However, this limited view of the purposes of the Establishment Clause

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[7] That same report observed that "[i]n this age, there can be no substitute for Christianity; that in its general principles, is the great conservative element on which we must rely for the purity and permanence of free institutions." *Id.* at 8. In these sentiments,

has not withstood analysis in contemporary Supreme Court decisions. It now is well-settled that the First Amendment was not just designed to prevent governmental preference of one Christian denomination over another, but rather to eliminate governmental support of religion in general. *E.g.*, *Flast v. Cohen*, 392 U.S. at 103; *Abington School Dist. v. Schempp*, 374 U.S. at 216; *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1961); *Everson v. Board of Education*, 330 U.S. at 15-16; *Anderson v. Laird*, 466 F.2d 283, 287-88 (D.C. Cir.), *cert. denied* 409 U.S. 1076 (1972). This Court has recognized that in a nation as religiously diverse as ours neutrality among Protestant, or even all Christian, sects is no longer sufficient, if it ever was, to ensure religious peace and secure the requisite separation between Church and State. Because a publicly-funded legislative chaplaincy only makes constitutional sense in a setting in which neutrality among such sects *is* sufficient to preserve the underlying values of the Establishment Clause, it is clear that today public funding of legislative chaplaincies violates the Establishment Clause. Simply put, a publicly-funded legislative chaplaincy is today no more compatible with the First Amendment than segregated public schools are with the Fourteenth.

The untenability of Petitioners' theory of the case can be demonstrated by a simple hypothetical. Let us assume that the religious view of our country continue to change and that two centuries from now nontheists are in the majority, and the majority of our legislators are nontheists. Instead of publicly-funded prayers, the legislators

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it echoed the 1853 Senate Report which revelled in the recognition of a "*Christian* Sabbath, in exclusion of the Jewish or Mahommedan Sabbath", and counseled against the "spread . . . [of] the dead and revolting spectacle of atheistical apathy." S. Rep. 376, 32d Cong., 2d Sess., at 3, 4 (emphasis in original).

The fact that these reports were predicated on a mistaken understanding of the First Amendment obviously detracts from whatever deference they are due. *Cf.* Brief for the United States at 15 n.10.

have publicly-funded agnostic and atheist readings from the works of Bertrand Russell, Jean-Paul Sartre, David Hume, etc. On Petitioners' theory of the case, this practice would have to be considered constitutional because there is nothing to distinguish the hypothetical practice from the current practice other than the nature of the religious views being expressed, and surely Petitioners cannot contend that the First Amendment differentiates between religious beliefs. Yet it is also evident that the Founding Fathers would not have approved of publicly-funded agnostic and atheist readings in the halls of Congress. *See supra*, p. 10. In short, adherence to Petitioners' theory of constitutional interpretation can only result in paradoxical and unsound results.[8]

What Petitioners fail to recognize is "that it is a constitution we are expounding", *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), and that "[i]n the application of a constitution, . . . our contemplation cannot be only of what has been but of what may be." *Weems v. United States*, 217 U.S. 349, 373 (1910). By attempting to focus too narrowly on what the Founding Fathers actually did, Petitioners overlook the values the Founding Fathers attempted to preserve via the First Amendment. Practices that were not inconsistent with those values in 1789 may very well, because of changed historical circumstances, undermine those values today.

One last historical note: amici cannot fail to point out that Petitioners have misrepresented the views of one of the more prominent members of the First Congress, namely James Madison. *See* Brief for the United States at 11-12. This matter might be insignificant were it not for the fact that Madison was principally responsible for the drafting

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[8] Amici, of course, do not want atheist readings in Congress; what they do want, and what they are entitled to, is a government that exercises a "wholesome 'neutrality' ", *Abington School District v. Schempp*, 374 U.S. at 222, with respect to all forms of religious belief and disbelief.

and adoption of the First Amendment, as this Court has recognized. *See Everson*, 330 U.S. at 13. Petitioners grudgingly concede that Madison was opposed to publicly-funded Congressional chaplaincies later in life,[9] but suggest that this was because he "apparently changed his mind on the chaplaincy question in later years." Brief for the United States at 12, n.8. If indeed this disapproval of publicly-funded chaplaincies were only an expression of Madison's later views, they would still have to take precedence over any contrary, earlier opinions. The Petitioners overlook the fact that in considering the opinions of any great thinker on a subject it is customary to look to that person's mature thought. One does not study Immanuel Kant's pre-*Critique* writings to determine his understanding of perception and causation. In any event, Petitioners, because of their misplaced reliance on circumstantial evidence,[10] are simply wrong about Madison's earlier views

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[9] Madison's views on the constitutionality of publicly-funded Congressional chaplaincies are eloquently set forth in his "Detached Memoranda", *see* E. Fleet, *Madison's "Detached Memoranda"*, III William and Mary Quarterly 558-59 (1946), and are reproduced in the Appendix to this brief.

[10] Petitioners rely on two facts: (1) Madison's membership on the House committee that was responsible for, among other things, regulating (*not* proposing, as Petitioners state) the appointment of chaplains, and (2) his vote in favor of a bill *one of whose provisions* provided for the compensation of Congressional chaplains. Brief for the United States at 12. However, as his "Detached Memoranda" indicate, Madison was not opposed to the appointment of chaplains; he was opposed to compensating them out of public funds. As for his vote for the compensation bill, this can be understood once it is recognized that the compensation bill, which was principally concerned with compensation for members of the House and Senate, was hotly debated, with the debate focusing on whether the members of the House and Senate should receive the same salary. I Annals of Congress 675, 679-80, 889-92 (1789); *see* 5 *Writings of James Madison* 414-15 n.1, 417 n.1 (G. Hunt ed. 1904) (letters to Monroe and Archibald Stuart indicating that the attention of the House had "for some days . . . been confined to the subject of compensation"). Indeed, the final vote in favor of the bill was

on the subject. On July 10, 1822 Madison wrote a letter to Edward Livingston in which he discussed the position he adopted in the First Congress on the propriety of funding the chaplaincies. In a passage that leaves no room for doubt, Madison wrote as follows:

> I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction . . . This has always been a favorite principle with me; *and it was not with my approbation that the deviation from it took place in Congs. when they appointed Chaplains to be paid from the Natl. Treasury.*

9 *Writings of James Madison* 100 (G. Hunt ed. 1910) (abbreviations in original; emphasis added).[11]

Madison had the sensitivity for principle and foresight that some of his colleagues lacked. He saw that as a matter of principle a publicly-funded legislative chaplaincy was questionable in a religiously homogeneous nation, and would be intolerable in a religiously diverse one.

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extremely close: 28-26. 1 Annals of Congress 891-92. The record of the debate indicates that Madison, knowing his vote was crucial, voted for the bill, because he "was extremely anxious that an accommodation should take place" between the two houses of Congress. 1 Annals of Congress 890. Thus, as is often the case with legislators, Madison, perhaps knowing he could not in any event persuade his colleagues concerning the compensation of the chaplains, presumably chose to swallow his opposition to a particular provision to ensure passage of a bill which, as a whole, he supported. It is also possible that Madison was not aware of the provision concerning the chaplains; when the bill was originally read to the House, no mention was made of compensation for the chaplains. 1 Annals of Congress 675.

[11] Petitioners are aware of this letter, yet they imply that the letter only represents Madison's views in 1822. Why then did Madison use the past tense in referring to his opposition to Congressional chaplaincies? Similarly the reference to his lack of "approbation" implies that he must have been in a position to approve or disapprove, *i.e.*, he must have been a member of Congress.

Madison recognized that a publicly-funded legislative chaplaincy, with the chaplains being elected by a majority of the legislators, "exhibit[s] in its naked deformity the doctrine that religious truth is to be tested by numbers, or that major sects have a right to govern the minor." E. Fleet, *Madison's "Detached Memoranda"*, III William and Mary Quarterly 558-59 (1946) (see Appendix). Madison understood that such an institution has no place in a country that cherishes its civil liberties. This Court should heed Madison's advice.

B. An Examination of the Chaplaincy Program in the United States Congress Demonstrates That a Publicly-Funded Legislative Chaplaincy Violates the Establishment Clause of the First Amendment

For a statute, rule or practice to survive an Establishment Clause challenge it must satisfy the criteria set forth in this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Petitioners have suggested this test is ill-suited for Establishment Clause cases not involving schools, Petitioners' Brief at 23, but as recently as this past December, in *Larkin v. Grendel's Den, Inc.*, 51 U.S.L.W. 4025 (1982), this Court applied the *Lemon* test in an Establishment Clause case that had nothing to do with schools.

Respondent in his brief has conclusively demonstrated that Nebraska's legislative chaplaincy fails to meet any of these criteria, and it is unnecessary to burden this Court by repeating that analysis here. Amici do believe, however, that some brief observations concerning the federal practice are in order. As amicus curiae United States has stated, "the Court's consideration of Nebraska's practice [should] be enhanced by a complete exposition of the federal experience." Brief for the United States at 2.

Petitioners' strategy in defending Nebraska's practice is obvious. It is to portray the legislative prayer practice as being a completely innocuous, essentially meaningless

ceremony, that is of no practical significance to the legislators, let alone anyone outside of the legislature. *See, e.g.*, Petitioners' Brief at 18 (practice has not been viewed "as that big of an issue"). The prayers of Nebraska's chaplain are supposed to simply reflect the "civil religion of America." Petitioners' Brief at 11. The prayers of Nebraska's chaplain are most decidedly not designed "to advance any religious view." Petitioners' Brief at 27.

Even if Nebraska's chaplain has, *per impossible*, managed to drain his prayers of religious significance, the practice would still run afoul of the First Amendment for at least two reasons. First, Nebraska's practice would have succeeded in completely secularizing (and thereby degrading) prayer and religious belief, which is, of course, exactly what many of the Framers feared would be the effect of government support of religion. Indeed, Petitioners' invocation of the "civil religion of America" is highly ironic since a nationwide civil religion is precisely what the Framers wanted to avoid. *See Everson v. Board of Education*, 330 U.S. at 67 (appendix to dissenting opinion of Rutledge, J., containing Madison's Memorial and Remonstrance Against Religious Assessments) (warning against employing religion as an engine of civil policy).

Secondly, a legislative chaplaincy is clearly an institution that can be so utilized as to have the effect of advancing religion, even if some legislative chaplaincies may not have that effect in practice. Amici are not aware of any standards or rules, in any of this nation's legislatures, prescribing what legislative chaplains may or may not say in their prayers.[12] Simply because some legislative chaplains may try to make their prayers as bland and in-

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[12] If a state or Congress did try to prescribe rules as to what legislative chaplains could or could not say, this would, of course, result in an excessive government entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. at 619.

There is a simple solution to this dilemma: stop paying the chaplains with public funds.

offensive as possible and not consciously use them as a vehicle for advancing a certain religious viewpoint does not mean that all chaplains will do so. This clear potential for abuse is sufficient to make the practice unconstitutional. *Larkin v. Grendel's Den*, 51 U.S.L.W. at 4028; *Lemon v. Kurtzman*, 403 U.S. at 618-19.

The federal practice is instructive in this regard. A quick scan of the Congressional Record for just the past several months reveals that our nation's legislators are routinely urged by the chaplains in Congress to accept the view that without a belief in God and adherence to His laws there can be "no morality, no justice", 128 Cong. Rec. S 2887 (daily ed. March 29, 1982); that those who believe in evolution are nihilists since "our system of values would be nonexistent if our Founding Fathers had declared: '. . . that all men are descended from monkeys' ", 128 Cong. Rec. S 4115 (daily ed. April 28, 1982); that God "turneth the Godless to destruction", 128 Cong. Rec. S 8165 (daily ed. July 14, 1982); that when "we fail to recognize and honor" God, "the one who created equality and . . . human rights, we forfeit both", 128 Cong. Rec. S 7239 (daily ed. June 22, 1982); that we must beg forgiveness for "the secularism, the antisupernaturalism which we have exchanged for faith in a Creator God", 128 Cong. Rec. S 9095 (daily ed. July 26, 1982); that "we diminish our humanness when we refuse" to worship God, 128 Cong. Rec. S 11133 (daily ed. Sept. 8, 1982); that "the God-factor is fundamental to our system, that if we refuse to be 'governed by God', we will be ruled by tyrants", 128 Cong. Rec. S 12361 (daily ed. Sept. 28, 1982), that it is lamentable when "[w]e profess faith, but practice atheism", 128 Cong. Rec. S 12445 (daily ed. Sept. 29, 1982); and that "our rights are secure only as we take God seriously", 128 Cong. Rec. S 13623 (daily ed. Dec. 1, 1982).

These prayers offered by Congress' chaplains have the undeniable purpose and effect of advancing a particular religious viewpoint. These prayers not only implicitly en-

dorse belief in God by the mere fact that they are being offered, but are also used as vehicles for expressly urging the legislators to believe in God, since, according to the chaplains, disbelief will lead to a situation in which there is "no morality, no justice," and in which "we will be ruled by tyrants" who are less than fully human. Amici are, to say the least, offended by these remarks, which are subsidized by their tax dollars, as any Christian, Jew, Buddhist or Moslem would understandably be offended were they forced to subsidize sermons to our nation's legislators which branded them as immoral and less than fully human simply because of what they believed. But whether the chaplains are correct in saying atheists are immoral or less than fully human is beside the point. What is important is that through their prayers the chaplains advance a particular religious viewpoint, and, therefore, they have no right to expect this nation's taxpayers to provide them with the funds for doing so. "The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" *Everson*, 330 U.S. at 15-16.

That the chaplains' prayers are delivered in the halls of Congress makes the constitutional violation all the more egregious. Whether or not anyone outside of the Nebraska legislature is aware of its chaplaincy program, (*see* Petitioners' Brief at 32) it cannot be denied that the existence and activities of the Congressional chaplains are well-known to the American public, and those who favor, rightly or wrongly, closer ties between Church and State unfailingly point to the chaplains and/or their activities as a means of buttressing their arguments. *See, e.g.*, Remarks at the Alfred M. Landon Lecture Series, 18 Weekly Comp. Pres. Doc. 1116 (Sept. 9, 1982); Remarks at the Centennial Meeting of the Supreme Council of the Knights of Columbus, 18 Weekly Comp. Pres. Doc. 996

(Aug. 3, 1982); Washington Times, May 17, 1982, at 8A, cols. 1 and 6; *see also* Letter from Edward E. McAteer, President, Roundtable Issues and Answers, to "Dear Friend" (undated but received by counsel for amici Aug. 30, 1982) (asking that postcards be sent to Chief Justice Burger urging him to keep chaplains in Congress).[18] Even relatively obscure newspapers have seen fit to comment on the Congressional chaplaincies, in terms that indicate the divisiveness of the practice. *See, e.g.*, Evening Journal [Martinsburg, W. Va.], March 31, 1982 at 4, col. 1 (editorial urging amicus O'Hair to "go straight to hell" for challenging the chaplaincy program). The employment of chaplains by Congress thus results in an appearance of government sponsorship, on a national level, of sectarian practices and beliefs that clearly "provides a significant symbolic benefit to religion in the minds of some." This is sufficient to render the practice unconstitutional. *Larkin v. Grendel's Den*, 51 U.S.L.W. at 4028.

But the Congressional chaplains are not engaged in purely symbolic exercises. To the contrary the prayers of the chaplains are not "mere symbolic gesture[s]," but "actually play a role of importance in the work of the Congress." Prayers Offered by the Chaplain Rev. Edward Gardner Latch at the Opening of the Daily Sessions of the House of Representatives During the Ninety-Fourth and Ninety-Fifth Congress viii-ix (1979) (remarks of Rep. Wright). This important role of prayers in the work of Congress is clearly significant since the legislative authority of Congress can be exercised, and has been exercised, in ways prejudicial to the interests of religious dissenters. *See, e.g.*, 110 Cong. Rec. 2607 (1964) *reprinted in* Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 3101 (remarks of Rep. Ashbrook in favor of amendment, which passed the House, but was deleted from final bill, excluding atheists from protection of the Act). The prayers of the chaplains can be used, and, as already indicated, are being used, to persuade our nation's

[18] A copy of this letter will be filed with the Clerk of this Court.

legislators that some religious dissenters, *i.e.*, those who do not believe in God, are immoral and/or less than fully human. Forcing an individual to support a religious institution with which he disagrees is contrary to the letter and spirit of the Establishment Clause, but to require religious dissenters to support with their tax dollars a religious institution that is also inimical to their own self-interest would render the Establishment Clause meaningless. Let us recall that that Clause was prompted in part by the outrage of "dissenters [who] were compelled to pay . . . taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters." *Everson*, 330 U.S. at 10.[14]

Amicus curiae United States urges this Court to uphold the constitutionality of paid legislative chaplains because "it [is not] plausible to suggest that paid legislative chaplaincies are 'but the . . . "nose of the camel in the tent" leading to an established church'." Brief for the United States at 32. This misses the point. If religious dissenters can be forced to pay their tax dollars for sermons to our nation's legislators which on a routine basis deride and ridicule the beliefs of these dissenters then the camel of religious oppression has already entered and trampled the tent housing our nation's civil liberties.

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[14] Amicus curiae United States has argued that the primary effect of the Congressional practice is not the advancement of religion since attendance during the reading of the prayers is not compulsory. Brief for United States pp. 26-27 n.18. This is a thoroughly muddled argument. A statute or practice is not any less unconstitutional simply because it is not the most efficacious way of achieving a religious goal. The test is whether, among the effects the statute or practice *does* have, its primary effect is the advancement (or inhibition) of religion. *Lemon v. Kurtzman*, 403 U.S. at 612. Amicus curiae United States overlooks the fact that the lack of compulsory attendance might also undermine the efficaciousness of alleged secular consequences, such as "bringing the legislature to order." Brief for United States at 28.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principles of religious freedom?

In strictness the answer on both points must be in the negative. The Constitution of the United States forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation?

The establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles: The tenets of the chaplains elected (by the majority) shut the door of worship agst the members whose creeds & consciences forbid a participation in that of the majority. To say nothing of other sects, this is the case with that of Roman Catholics & Quakers who have always had members in one or both of the Legislative branches. Could a Catholic clergyman ever hope to be appointed a Chaplain? To say that his religious principles are obnoxious or that his sect is small, is to lift the evil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers, or that the major sects have a right to govern the minor.

If Religion consist in voluntary acts of individuals, singly, or voluntarily associated, and it be proper that public functionaries, as well as their Constituents shd discharge their religious duties, let them like their Constituents, do so at their own expenses. How small a contribution from each member of Congress wd suffice for

the purpose? How just wd it be in its principle? How noble in its exemplary sacrifice to the genius of the Constitution; and the divine right of conscience? Why should the expense of a religous worship be allowed for the Legislature, to be paid by the public, more than that for the Ex. or Judiciary branch of the Government?

J. Madison, Detached Memoranda, *reprinted in* E. Fleet, *Madison's "Detached Memoranda"*, III William and Mary Quarterly 558-59 (1946).